



1-1-1996

# Empiricists and the Collapse of the Theory-Practice Dichotomy in the Large Classroom: A Review of Lopucki and Warren's Secured Credit: A Systems Approach

William J. Woodward Jr.

*Santa Clara University School of Law, wwoodward@scu.edu*

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

---

## Recommended Citation

74 Wash. U. L.Q. 419

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

## BOOK REVIEW

### EMPIRICISTS AND THE COLLAPSE OF THE THEORY-PRACTICE DICHOTOMY IN THE LARGE CLASSROOM: A REVIEW OF LOPUCKI AND WARREN'S *SECURED CREDIT: A SYSTEMS APPROACH*

WILLIAM J. WOODWARD, JR.\*

SECURED CREDIT: A SYSTEMS APPROACH By Lynn M. LoPucki and Elizabeth Warren. Boston: Little, Brown and Company, 1995. Pp. xxviii, 805. \$ 48.00.

The simmering "theory-practice" debate broke into a full boil with the 1992 publication of *Legal Education and Professional Development—An Educational Continuum* (known as the *MacCrate Report*).<sup>1</sup> Law schools, it was said, are not doing all they might to adequately prepare their students for work as real, *practicing* lawyers.<sup>2</sup> The debate has tended to project a dichotomy between "theory"—what law professors are interested in—and "practice"—what lawyers require to practice law.<sup>3</sup> And although it replicates one that probably began nearly thirty years ago between Grant Gilmore and members of the then-called "sociological school," including Stewart Macaulay,<sup>4</sup> today that dichotomy is most often framed as a

---

\* Professor of Law, Temple University. Thanks to Amy Boss, Jean Braucher, Margaret Howard, Lynn LoPucki, Eleanor Myers and Candace Zierdt for helpful comments on earlier drafts, and to Sami Hijab for his help with the research.

1. Section on Legal Educ. and Admissions to the Bar, American Bar Ass'n, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* (1992) [hereinafter *MACCRATE REPORT*]. Judge Harry Edwards helped quicken the debate with Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). See also Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993) (discussing the ideas raised by Judge Edwards's article).

2. *MACCRATE REPORT*, *supra* note 1, at 5.

3. See generally Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 & n.2, 595 & n.7 (1994) and authorities cited therein.

4. That form of "theory-practice" debate (which was really a debate about theory) and the part Stewart Macaulay and other empirical scholars have played in it are detailed in Jean Braucher, *The*

tradeoff between the traditional law school classroom experience and skills training.<sup>5</sup>

A largely omitted target in the debate is the law school casebook,<sup>6</sup> that remarkable creation associated with Langdell,<sup>7</sup> which continues as the teaching source for most courses in law school. These high-priced books have a captive audience of very bright, highly educated readers who probably read the book several times. Indeed, they do not merely *read* a casebook; they *study* it. And they do this when they are unusually impressionable—at a time when they are constructing the way they will think about the legal and societal problems addressed in the book. Their potential for influence notwithstanding, casebooks have largely escaped critical attention; their potential for either exacerbating the so-called “gap” between theory and practice in the classroom<sup>8</sup> or for bringing theory and practice together has largely gone unnoticed.

A new casebook by Professors Lynn LoPucki and Elizabeth Warren adds to a small but growing number of casebooks<sup>9</sup> that merge sophisticated

---

*Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995).

5. Cf. generally Menkel-Meadow, *supra* note 3 (criticizing the polarization of “law” and “skill”).

6. It is largely omitted, but not omitted entirely. Lawrence Friedman took the contracts casebook to task over 30 years ago in *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* vii-ix (1965). Friedman and Stewart Macaulay argued for a more empirically-based approach to the subject matter in Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805.

7. See Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 109 (1995). See generally C.C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871).

8. Many modern casebooks have a strong theoretical orientation, and in the business area, that orientation often is one of law and economics. Cf. Robert E. Scott, *Through Bankruptcy with the Creditors' Bargain Heuristic*, 53 U. CHI. L. REV. 690 (1986) (reviewing DOUGLAS G. BAIRD & THOMAS H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY* (1985)). The rise in this theoretical orientation parallels the quickening of the theory-practice debate and the rise of economic-sounding rhetoric in national politics. Cf. Braucher, *supra* note 4 at 53-61 (discussing the Republican Party's “Contract” with America). Just as politicians can argue that the War on Poverty and similar programs “caused” the crises we face today, one could claim that the rise of law and economics in law schools “caused” both a widening of the “gap” between theory and practice and the wholesale political embrace of the incentive-based argument. This political form of economic analysis permits (even encourages) the assertion that welfare mothers will have fewer children if they are given a “disincentive” through welfare reform. I do not make any claim of a causal connection here, although the coincidence is quite curious.

9. At least two other modern casebooks in the business law field have a similar orientation. In *THE LAW OF DEBTORS AND CREDITORS* (2d ed. 1991), Elizabeth Warren and Jay Westbrook originally built a problem-centered casebook that is anchored in the reality of bankruptcy law practice. The LoPucki and Warren book builds on the foundation laid by Warren and Westbrook. In *CONTRACTS: LAW IN ACTION* (1995), Stewart Macaulay, John Kidwell, William Whitford, and Mark Galanter

legal scholarship with a down-to-earth, practice-based focus, thereby reducing the perceived "gap" significantly.

The book is *Secured Credit: A Systems Approach*.<sup>10</sup> LoPucki and Warren are both prominent "empiricist" scholars,<sup>11</sup> and they bring to their teaching materials a life and practice orientation that is different from most of what is available today. Scarcely a "casebook" in the old tradition—only about thirty-five percent of the book is dedicated to cases<sup>12</sup>—the book is a clear break from convention on many less obvious fronts. The book reflects important new thinking both about the subject matter traditionally

published a set of teaching materials in the making since the 1960s. This casebook brings into the classroom the empirical material that these scholars have been collecting over the years. Warren and Westbrook's book is reviewed in Lynn M. LoPucki, *Bringing Realism to the Classroom—A Review of Warren and Westbrook's The Law of Debtors and Creditors*, 1987 WIS. L. REV. 641. The contracts book is reviewed in Braucher, *supra* note 4, at 75-86.

10. LYNN M. LOPUCKI & ELIZABETH WARREN, *SECURED CREDIT: A SYSTEMS APPROACH* (1995).

11. The modern "empiricist" tradition probably begins with Stewart Macaulay's work in the mid-1960s. *See, e.g.*, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) [hereinafter Macaulay, *Non-Contractual Relations*]; Stewart Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, PRAC. LAW., Nov. 1963, at 13. Empirical work of that kind appeared sporadically after that, *see, e.g.*, Philip Shuchman, *New Jersey Debtors 1982-83: An Empirical Study*, 15 SETON HALL L. REV. 541 (1985); Philip Shuchman, *The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States*, 88 COM. L.J. 288 (1983); Philip Shuchman & Thomas L. Rohrer, *Personal Bankruptcy Data for Opt-Out Hearings and Other Purposes*, 56 AM. BANKR. L.J. 1 (1982); William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047; William C. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, but did not find its own identity in the literature until perhaps 1989 with the publication of *As We Forgive Our Debtors* by Teresa Sullivan, Elizabeth Warren, and Jay Westbrook. Since that time, empirical work in commercial law has seen rapid growth. *See, e.g.*, Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993); Lynn M. LoPucki & George G. Triantis, *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT'L L.J. 267 (1994); Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990); Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1. More important, perhaps, is a growing recognition that many policy conclusions depend on empirical information which is largely undeveloped.

The authors make clear their debt to Macaulay in the *Teacher's Manual*:

Stewart Macaulay once explained to one of us why it was wrong to teach irrelevancies. Once the students got out in practice and discovered the irrelevancy of much of what we taught, everything we taught became suspect and was thereafter dismissed as the meanderings of irrelevant people. He speculated that if we really wanted to have an effect on what our students did or thought, we had to teach them about a world they would recognize when they got there. We owe Stewart a larger debt than we could ever repay.

LYNN M. LOPUCKI & ELIZABETH WARREN, *TEACHER'S MANUAL FOR SECURED CREDIT: A SYSTEMS APPROACH* 4 (1995) [hereinafter *TEACHER'S MANUAL*].

12. A rough page count yielded about 275 pages of cases in the 791 page book. The rest is straightforward expository text, problems, and a scattering of statutes.

called "secured transactions" and about the appropriate mix of materials for educating the future lawyer in a subject covered by the Uniform Commercial Code.

But more importantly, the book reflects new thinking about how to train the future *business* lawyer to approach business law problems. As empiricists, both of the authors have focused much of their scholarship on how businesses do business and how lawyers practice law. They have brought to their materials both their scholarly orientation and the results of their empirical work. Their materials will aid teachers in teaching students to be sensitive to facts and their inherent uncertainty.<sup>13</sup> They will help train them to understand the significance of incomplete information and how it affects legal advice. The materials will help students understand the many ways that a client's business interests and legal interests interact and often point to inconsistent action. Perhaps most importantly, these materials will more readily help teachers train students to approach problems not from the backward-looking, fixed-fact orientation of the litigator,<sup>14</sup> but from the forward-looking, uncertain-future perspective of the transactional business lawyer. Students who use these materials will emerge better able to enter a sophisticated business practice because they will be trained to "think like *business* lawyers."

The LoPucki and Warren materials readily demonstrate that the "theory-practice" dichotomy is a false one: The empiricist scholar most naturally and easily brings a practice orientation into the classroom. The materials also demonstrate that we have paid insufficient attention to the potential of the large, traditional classroom to better orient students to a transactional practice and the problems they will encounter there.

The book breaks with tradition in many ways, and these differences

---

13. Cf. FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 123-26 (1981), where the authors studied Chicago lawyers and reported in 1981 that fact development and sensitivity were reported by lawyers to be the most important talent they needed for practicing law.

14. The text oversimplifies the litigator's job but expresses what I see as a core difference between the litigator and the transactional lawyer. Litigation, even most litigation seeking injunctions, is almost always centered on a past set of facts (the one major exception may be structural injunction litigation, where the comparable focus is on framing a remedy). The investigatory job is to determine what happened; the creative job is to develop a theory that best presents the client's version of the facts. Clients can, of course, use litigation strategically and have many complex choices to make about claims that they might have (e.g., whether to sue; under what theory; where; how hard to pursue it, etc.). The text's point is, however, that litigation is not nearly as future-oriented as is transactional work. Planning, the creation of new value, and the actual *creation* of facts dominates in transactional work in a way it seldom can in litigation.

emanate from the authors'<sup>15</sup> views of what lawyers need in order to assist clients with secured credit problems. These ideas are most easily understood as animated by the authors' work as scholars and dictate some unconventional choices of what material to cover, how to cover it, and how to organize it. Professors LoPucki and Warren have chosen 1) to use a smaller proportion of Article 9 materials to develop an understanding of the legal regime of secured credit; 2) to introduce considerably more ethics and noncommercial-law material into the classroom; 3) to substantially redefine the content of the course's coverage of bankruptcy; 4) to reorganize the material so that it starts with default rather than ending with it; and 5) to reorient the student's approach and thinking from litigation to planning and transactional work.

Some of these choices will be unsettling to teachers who have heretofore treated the subject matter in a relatively conventional way.<sup>16</sup> Students, on the other hand, will think about legal problems involving secured credit differently from the start. One would expect them to be more skeptical about asserted theories of secured credit, to expect fewer determinate answers to legal questions involving secured credit, to have a better sense of how to use the law strategically to accomplish client goals, and to be able to think transactionally. To make room for the unconventional, students may lose some theoretical and technical detail.<sup>17</sup> What some may find debatable is whether the gains in new material are preferable to the loss of some of the old.

To fully appreciate how different this book is, it is best to begin with LoPucki and Warren's orientation as scholars, for that helps explain many of the choices they have made in the book.

---

15. Given their heavy and obvious involvement in actually writing the book, it is a misnomer to refer to LoPucki and Warren as "editors."

16. The author is one such teacher who has used traditional materials (e.g., RICHARD E. SPEIDEL ET AL., *SECURED TRANSACTIONS* (5th ed. 1993) and DOUGLAS G. BAIRD & THOMAS H. JACKSON, *SECURITY INTERESTS IN PERSONAL PROPERTY* (2d ed. 1987)) in his Article 9 offerings in the past. Because they are so different, the LoPucki and Warren materials will challenge most teachers both theoretically and pedagogically. Fortunately, the authors' *Teacher's Manual* is explicit and extensive and is one of the best such tools on the market.

17. Apart from law school exams and perhaps the bar exam, most lawyers seem to have a limited need for extensive mastery of doctrinal complexity. See generally ZEMANS & ROSENBLUM, *supra* note 13.

## I. ORIENTATION

Both LoPucki and Warren are modern Legal Realists<sup>18</sup> in the relatively new “empiricist” tradition.<sup>19</sup> These are scholars who focus on delivered (as distinct from enacted or decided) law<sup>20</sup> and conduct empirical research to determine whether the law that is enacted by legislatures or implemented by judges is actually delivering what it purports to. Rather than beginning with theory and working from that to messy reality, they attempt to develop their views of the legal system by studying directly the behavior of persons subjected to it. The empiricist scholars recognize that empirical assumptions or assertions underlie most legal policy choices and have attempted to learn whether “the facts” on which we base policy really exist.

Stewart Macaulay is probably the first modern example of this different orientation. In his path-breaking work, *Non-Contractual Relations in Business: A Preliminary Study*,<sup>21</sup> Macaulay learned that business people did not respond to contract law rules nearly as much as one might imagine. Reputational issues, repeat business, and other informal “sanctions” proved far more dominant in how business people actually behaved than did contract damages or other “sanctions” that “the law” might supply. LoPucki and Warren have each uncovered comparable, counterintuitive evidence that factors outside the traditional focus for legal study affect—and may control—ultimate outcomes for those who deal with the legal system.

This is not a place to summarize the extensive work of these two scholars; a couple of examples should suffice. In *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed*

18. TEACHER’S MANUAL, *supra* note 11, at 1.

19. See *supra* note 11 and accompanying text.

20. See generally Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers’ Heads*, 90 NW. U. L. REV. (forthcoming 1996).

To quote LoPucki & Warren:

We are more interested in the empirical reality of secured credit than myths perpetuated by arm chair theorists. To our minds, secured credit *is* what secured credit *does*.

We think that the reality of the secured credit system is where the truly interesting intellectual questions arise: How does the system work? How do the day-to-day practices of lawyers in the system relate to the law on the books? If we change some aspect of the system, how does it affect the remainder? Who is helped and who is hurt by a particular rule? In what ways are outcomes subject to manipulation by strategy? How often do such manipulations occur? What ethical problems arise for lawyers in a lending system based on legal interests in collateral?

TEACHER’S MANUAL, *supra* note 11, at 1.

21. Macaulay, *Non-Contractual Relations*, *supra* note 11.

*Companies*,<sup>22</sup> LoPucki and George Triantis presented the results of their study of the bankruptcy reorganizations of American and Canadian companies. They learned that, despite the large differences in the statutory law governing insolvency, the reorganization process for similarly situated companies in these two countries was very similar.<sup>23</sup> They concluded that “although lawmakers in the two countries set out to create very different systems, the systems were bound to converge over time toward a steady state in which the parts would form a functional whole.”<sup>24</sup> This ought to prompt the policy-maker to be concerned more about system limitations than doctrinal detail. This larger point that, when viewed globally, the details of reorganization law are not controlling outcomes, is not a point that would occur to most law students. Yet to understand the law governing reorganization as does a sophisticated practitioner of bankruptcy, one has to have a sense of the law’s limited role in the larger dynamics of the process.

Among the scores of facts about bankruptcy that Warren and her colleagues learned in the first large-scale empirical study of the bankruptcy process was one that bankruptcy practitioners would understand intuitively but which would have no place in a traditional doctrine or theory-driven perspective. They discovered that, under similar economic circumstances, debtors in one district would make fundamentally different bankruptcy choices than would their counterparts in a different district of the same state.<sup>25</sup> Later research strongly suggested that the legal culture within a particular bankruptcy district accounts for different debtor action and treatment.<sup>26</sup> These differences in legal culture are not accessible through conventional legal research tools and raise fundamental questions about the capacity of a national statute<sup>27</sup> such as the Bankruptcy Code<sup>28</sup> to treat similarly situated persons similarly.<sup>29</sup> None of this would, however, be big news to the practitioner. She understands district to district differences

---

22. LoPucki & Triantis, *supra* note 11.

23. *Id.* at 339-43.

24. *Id.* at 269.

25. TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 246-52 (1989).

26. Braucher, *supra* note 11.

27. This is not solely a *national* problem. No doubt some state legislation suffers comparable problems treating similarly situated persons in the same way.

28. 11 U.S.C. §§ 101-1330 (1994).

29. The phenomenon explains (to some extent) why conventional wisdom among practitioners is that “local counsel” is necessary for good representation in a “foreign” jurisdiction. For example, Philadelphia practitioners often engage “local counsel” even for a matter in an adjacent Pennsylvania county.



almost intuitively and often uses these differences strategically. By discovering what the practitioner already knows about the legal system's operation, the empiricist can begin to identify (and bring into the classroom) those things that are currently outside the realm of either traditional doctrine or theory.

The counterpart to the empiricist is the "theoretician": the scholar who projects policy choices from a theoretical framework and set of assumptions. The theoretician approaches legal questions from a theoretical starting point, considers how the theoretical regime ought best to work, and then relaxes some of the initial assumptions to permit the model to better approach the untidy reality in which the legal system operates. Since the 1970s, a form of economic analysis<sup>30</sup> has served as the underlying theory from which many theoreticians explain<sup>31</sup> or project<sup>32</sup> policy. Whereas the theoretician can, through economic analysis, "prove" that human beings will not gouge one another through contractual penalty clauses,<sup>33</sup> the

30. One form of economic analysis used by many in the law-and-economics movement is an over-simplified brand of analysis based on assumptions that are sufficiently unrealistic so as to be false. See Lynn M. LoPucki, *Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig*, 91 MICH. L. REV. 79, 106-10 (1992) (addressing the irrelevancy of analysis premised upon theories of "perfect markets" or "zero transaction costs" to the real world). The theoretician then projects from that unrealistic starting point normative policy choices using over-simplified analysis. Even theoreticians who bring *sophisticated* economics to their work ultimately project human responses to changes in legal stimuli. The work of LoPucki, Warren, and other empiricists suggests that the supposed connection between legal stimulus and human response may be tenuous indeed.

31. Richard Posner is probably best known for explaining a wide range of legal regimes and human behavior to be the result of economic factors. Sharp, biting criticism has had minimal effect on his views. A good sampling of such critique spanning nearly two decades is Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (commentary and book review); J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447 (1987) (book review essay); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992) (book review); Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413 (1993) (book review essay).

32. Forms of law and economics have been used to make normative recommendations in nearly all areas of business law. In bankruptcy, it has fueled recommendations to jettison the Chapter 11 reorganization process. See Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992). *Contra* LoPucki, *supra* note 30; Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437 (1993). In secured credit, a form of it has been used to recommend elevating unsecured creditors over bankruptcy trustees. James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823 (1993), *excerpted in* LOPUCKI & WARREN, *supra* note 10, at 602-06. In torts it has been used in various forms to recommend abolishing or scaling back the tort of interference with contract. See generally William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract* 80 MINN. L. REV. (forthcoming 1996).

33. Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369 (1990). A work like Professor Schwartz's is in the best scientific tradition of advancing a theory, predicting outcomes, and implicitly inviting

empiricist would suggest that the issue was empirical and would want to study actual human contracting behavior before arriving at any firm conclusions.<sup>34</sup>

An empiricist orientation means that the theoretical lines that separate one legal (or law school) subject from another often become blurred. The development of one area of law might be related to the development of a doctrinally unrelated area,<sup>35</sup> and one may need to study both to adequately understand either. To make matters worse, the lines between "law," as traditionally understood, and "non-law" may be blurred as these areas also can be interrelated or fused. Much empirical work suggests that business people do not behave as legal theory might predict.<sup>36</sup> This comes as no surprise to experienced business lawyers who know that legal problems do not neatly fit legal pigeonholes but often involve multiple, interacting questions of law and business. Pre-existing legal doctrine is less of a constraint to one with an empiricist orientation, because that orientation more directly models the way practitioners look at legal problems. Because the empiricist focus is on the actual workings of the legal system—the law as *delivered*—an empiricist orientation has major implications for law school instruction. Almost by definition it will bring the student closer to the real world of actual law practice.

## II. COVERAGE

LoPucki and Warren's empiricist orientation is evident throughout the book. They continually exhibit an empiricist's skepticism toward much of the received theoretical wisdom about secured credit,<sup>37</sup> a skepticism which

---

empirical testing. Unfortunately, unlike physics, where scientists are in the business of testing theories, few law professors make it their business to test theories such as Professor Schwartz's. The result often is that theory remains untested empirically and, instead, can be read (or misread) as an assertion about real human behavior. The substitution of empirical assertion for empirical fact in modern politics is evidence that theory can be misread (or misused) as fact, and policy built on it.

34. Cf. Weintraub, *supra* note 11.

35. See, e.g., Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) (discussing the relationship of bankruptcy law to contract law and state collection law); William J. Woodward, Jr., *New Judgment Liens on Personal Property: Does "Efficient" Mean "Better"?*, 27 HARV. J. LEGIS. 1 (1990) (examining the impact of modifications in state collection law on other parts of the "extraordinarily interconnected debtor-creditor system").

36. See, e.g., authorities cited in *supra* note 11.

37. Perhaps most obvious is their skeptical attitude toward "the ostensible ownership problem" as an explanation for secured credit. See LOPUCKI & WARREN, *supra* note 10, at 380-84, 399-400 (referring to the "ostensible ownership" theory as the "possession-gives-notice theory"). For more explicit criticism of this view, see Charles W. Mooney, Jr., *The Mystery and Myth of "Ostensible*

echoes the approach they take to their scholarship. Their criterion for including material is not whether it supports or refutes the unifying theory, but rather (to paraphrase them), whether the material will arm the student for what she will encounter in practice or help her to reflect on what is out there.<sup>38</sup> LoPucki and Warren's orientation will obviously generate a different set of materials from that of the theoretician. What is significant is the depth of those differences.

*A. What "law" should be the focus of the materials?*

The Uniform Commercial Code is the central focus of the law school's commercial law curriculum. Article 9 of the U.C.C. will often be the direct focus of a mainstream law school course.<sup>39</sup> LoPucki and Warren's book is targeted at that course. However, they have redefined the breadth of the traditional subject and have included a far broader range of material for study than does the traditional casebook. Their subject matter is not "Article 9 of the Uniform Commercial Code" but, rather, the phenomenon of and legal regime governing secured lending—the secured credit system.<sup>40</sup> The question the redefined content of their book places squarely on the table is: What should students study in order to function adequately

*Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683, 725-43 (1988). For a discussion of the "ostensible ownership" problem as a foundation of secured credit, see Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 179-94 (1983), and Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1161-64, 1178-82 (1979). Baird and Jackson used "ostensible ownership" as the organizing principle for their casebook on secured transactions. See BAIRD & JACKSON, *supra* note 16, at 1-81, 101-03. Chapter 1 is entitled "Secured Transactions and the Problem of Ostensible Ownership." *Id.* at 1.

38. TEACHER'S MANUAL, *supra* note 11, at 4 ("We want them to see these things in part to arm them for what they will encounter and in part to help them reflect on what is out there").

39. At Temple University and the University of Pennsylvania, at least, the secured transactions course is the first (and sometimes the only) commercial law course that the student will take. The content of the traditional Article 9 course may, to a large extent, be driven by the availability of materials. Publishers offer either casebooks on Article 9 itself, e.g., BAIRD & JACKSON, *supra* note 15, or books combining Article 9 of the UCC with other parts of the UCC, e.g., RICHARD E. SPEIDEL ET AL., *SALES AND SECURED TRANSACTIONS* (5th ed. 1993).

40. Hence the book's title. As they explain:

We see the secured credit system not as a mere ordering of knowledge or a way of thinking about things, but as a real life system where people go to work every day and where some things work smoothly, some work clumsily, and some work not at all. The system is not composed merely of law, but of people, papers, computers, money, debts, hundreds of kinds of collateral, customs, procedures, and law.

TEACHER'S MANUAL, *supra* note 11, at 4. See also *supra* note 20.

as practitioners in the field of secured lending?

### 1. *Real Estate*

The phenomenon of secured credit—a contract involving a loan backed up by collateral—is much broader than Article 9 of the U.C.C. Far older than the Article 9 security interest is the real estate mortgage, typically the focus of its own law school course on real estate transactions. But instead of treating real estate finance as a separate and excluded subject, LoPucki and Warren dedicate perhaps ten to fifteen percent of their materials to this theoretically “separate” subject matter.<sup>41</sup> Through these materials, the student becomes acquainted with the real estate foreclosure system,<sup>42</sup> recording system,<sup>43</sup> and priority system.<sup>44</sup>

This, of course, gives more context to the Article 9 security interest and allows one to examine Article 9 alongside alternative systems.<sup>45</sup> This broader context converts foreclosure, recording, and priority into problems endemic to any secured transaction and gives new perspective on Article 9’s (and the real estate system’s) particular solutions to those more general problems.

Foreclosure is a good example. A central distinction between a secured transaction and transactions that have similar physical characteristics (e.g., true leases and some bailments) is the particular regime one must follow on default. Whether one is within the real estate system or Article 9, if the

---

41. LoPucki and Warren are not the first to bring real estate into the traditional Article 9 course. Professors Nimmer and Hillinger, for example, give this justification in their 1992 secured credit book:

We discuss elements of real estate finance law in a personal property financing case book because we believe it is time to overcome this legal insularity. These two parallel, self-contained bodies of law are woven from the same cloth. Consideration of both yields valuable insights into each. Throughout these materials, we discuss the Article 9 and real estate approach to a particular problem or issue. This comparative approach helps to reveal each system’s underlying assumptions and policy goals and thereby creates a better perspective from which to evaluate either system.

RAYMOND T. NIMMER & INGRID MICHELSEN HILLINGER, *COMMERCIAL TRANSACTIONS: SECURED FINANCING* 7 (1992).

42. LOPUCKI & WARREN, *supra* note 10, at 24-41 (Assignments 2 & 4).

43. *Id.* at 403-24 (Assignment 20).

44. *Id.* at 644-66 (Assignment 33).

45. By including *National Peregrine, Inc. v. Capital Fed. Svcs. & Loan Ass’n of Denver*, 116 B.R. 194 (Bankr. C.D. Cal. 1990), in the materials, the authors facilitate one’s examination of the non-Article 9 system now in place for using federally protected intellectual property, such as copyrights, as collateral. LOPUCKI & WARREN, *supra* note 10, at 329-36. The authors also develop the system for using motor vehicles as collateral through Article 9 and motor vehicle registration acts. *Id.* at 503-26. They cover these materials even in the three-hour course in part because of the context these systems provide for Article 9 and real estate. TEACHER’S MANUAL, *supra* note 11, at 189.

transaction is a *secured* transaction, one cannot simply retrieve the collateral from the debtor and keep it; one must, rather, follow a set of technical rules to “foreclose” the debtor’s interest in the collateral. It is by no means evident from a study of Article 9 alone why this must be so. But, by explaining the idea of foreclosure through a “pseudo-history” of real estate foreclosure,<sup>46</sup> the authors develop the factors that led to the procedures. An understanding of this larger context within which Article 9 fits enables students to understand and evaluate the rationale behind the many mandatory rules governing default and foreclosure in Article 9.<sup>47</sup> It also gives them background to understand why courts might not allow the parties’ documented, formal characterization of the transaction to control a borrower’s (or lender’s) rights on default.

The inclusion of even this much real estate is bound to be controversial, and the authors have attempted to defend their decision in the *Teacher’s Manual*.<sup>48</sup> To teachers who have focused only on Article 9 of the U.C.C., the material will be unfamiliar and perhaps intimidating. To the extent that one believes that one’s course offering is dedicated to Article 9 of the U.C.C., the inclusion of this much real estate could raise concerns about fitting the material to the advertised course offering.<sup>49</sup> Finally, if one includes real estate within the finite time dedicated to secured lending, something else must go. Many teachers believe that they already have insufficient time to address what students need from the course.

On the other hand, the inclusion of real estate offers students a perspective on secured lending they would not get in discrete courses on Article 9 and real estate transactions. This permits them to evaluate the approaches of both systems to different problems and to consider whether the differences are functional, historical, or neither. Moreover, the inclusion of real estate tracks much of the secured lending practice—many lenders do not focus on one kind of collateral to the exclusion of the other. If practitioners address both kinds of lending in a typical practice, or if the two kinds of lending are interrelated, the LoPucki and Warren classroom

---

46. LOPUCKI & WARREN, *supra* note 10, at 27-29.

47. *E.g.*, U.C.C. §§ 9-504(2), 9-505, 9-506, 9-507.

48. TEACHER’S MANUAL, *supra* note 11, at 4-5. *See also supra* note 41.

49. For example, Temple University’s 1995-96 catalog specifies for its Secured Transactions course:

Creation, perfection and enforcement of security interests in personal property under Article Nine of the Uniform Commercial Code. A major component of this offering concerns the interaction of Article Nine with the Federal Bankruptcy Law and the effect of the bankruptcy law upon a lender’s decisions and expectations.

will better orient students to the "real world" they will encounter. Finally, including real estate acquaints students with the rudiments of that entire area of practice. This will prove helpful to the many students who will not take the real estate transactions course.

## 2. *Creditors' Rights and Bankruptcy*

LoPucki and Warren have also made some unconventional choices about both creditors' rights and bankruptcy coverage.

To give students an understanding of what a lender gets through a secured lending transaction, they include a brief excursion into state collection law.<sup>50</sup> It is unusual to have this much emphasis on state law other than the U.C.C. in materials that focus on secured transactions.<sup>51</sup> However, including it proves useful by giving students a context within which to view the secured party's remedies (under U.C.C. and non-U.C.C. law) and to allow students to understand and distinguish foreclosure in different contexts. Moreover, it is useful for students who do not go on to study bankruptcy to develop some sense of what is involved in collecting a judgment in our civil system.

The amount of bankruptcy they cover is probably about the same as more traditional treatments,<sup>52</sup> but the mix and placement is quite different from the more conventional offering. The central bankruptcy focus in most casebooks is likely to be the automatic stay, the strong-arm power of the trustee, and the preference.<sup>53</sup> LoPucki and Warren place more emphasis on the bankruptcy distinction between secured and unsecured claims,<sup>54</sup> how those claims are calculated and paid in Chapters 7, 11, and 13,<sup>55</sup> and the procedures for financing Chapter 11 debtors.<sup>56</sup> Instead of spending a week or more on bankruptcy preferences,<sup>57</sup> they limit coverage to

---

50. LOPUCKI & WARREN, *supra* note 10, at 3-23 (Assignment 1).

51. LoPucki and Warren put default at the front of the course rather than at the back, and part of the background material for understanding default in the secured transaction is the law that would control collection absent the secured transaction. This material naturally gets more emphasis by its early appearance in the course.

52. Seven of the thirty-nine Assignments are dedicated to bankruptcy issues. Bankruptcy also comes up occasionally in other Assignments.

53. *E.g.*, BAIRD & JACKSON, *supra* note 16, ch. 5; SPEIDEL ET AL., *supra* note 16, ch. 8.

54. *Id.*

55. *Id.* at 542-61 (Assignment 27).

56. *Id.*

57. *E.g.*, BAIRD & JACKSON, *supra* note 16, at 509-46 (offering 28 problems on preferences); SPEIDEL ET AL., *supra* note 16, at 430-50.

preferential *security interests* and treat them in one class.<sup>58</sup> They also spread bankruptcy through the whole course rather than locating it in one place.

Again, the trade-off here could be breadth for depth, and it is likely to be controversial. The imponderable detail and theoretical complexities of preferences makes them great fun to teach. Preference problems have “answers” that probably appeal to students. Yet one wonders how much of that detail ultimately either sinks into students or matters to the practitioner. LoPucki and Warren’s choice of bankruptcy coverage is driven by the apparent belief that a general orientation to bankruptcy through pervasive coverage will be more useful to both understanding secured credit and ultimately practicing it than will a deep excursion primarily into the automatic stay and trustee avoiding powers.

*B. How much “non-law” is appropriate?*

More unusual than their choices about the legal rules to be covered is their choice to include large doses of material that one may not normally encounter in any mainstream law school course and would seldom encounter in a course on secured credit. However, their empiricist and Legal Realist orientation probably makes this inescapable. What is important is the law that actually reaches the client, the range of choices that law gives the client, and the myriad factors (legal and nonlegal) that the client might consider in deciding what to do.<sup>59</sup>

Their broader focus requires that the book be dominated by the authors’ own text and problems—there is little in the cases or in the other literature that sees the subject matter with the same breadth LoPucki and Warren do. Appellate cases, by themselves, certainly cannot efficiently develop the myriad factors that operate on business client decisions and strategies in the field of secured lending.<sup>60</sup>

Throughout the book, the authors attempt to simulate with richly textured, multi-variable problems what the practicing business lawyer will confront in the field of secured lending. These problems are different from

---

58. LOPUCKI & WARREN, *supra* note 10, at 611-26 (Assignment 31). They explain this decision in the TEACHER’S MANUAL, *supra* note 11, at 233.

59. See *supra* note 40. Of course, this broader subject may come at a cost: One can sacrifice depth when one adds breadth; one can sacrifice doctrinal and theoretical development when one adds practice-oriented material.

60. See TEACHER’S MANUAL, *supra* note 10, at 6 (explaining why the authors included relatively few cases in the textbook). The authors include many good cases to illustrate or develop points they make in the text, but cases are not the focal point as they are in traditional casebooks.

those encountered in most other books:<sup>61</sup> They are inevitably broader and more complicated than "Article 9" or even "the law of secured credit" simply because that is the nature of a transactional business law practice. As an obvious example, legal expenses and compliance costs always matter to clients.<sup>62</sup> Thus, that the United States has over 4,300 filing systems servicing the secured credit system<sup>63</sup> and that it costs perhaps \$50 to search a single name<sup>64</sup> become relevant facts in the advice one gives clients.<sup>65</sup> Competent business lawyers instinctively consider such costs in defining options for clients. They also take account of competitive forces, business reputation, and the laws of physics.<sup>66</sup>

The problems are designed to be the central focus for class discussion<sup>67</sup> and press students to consider not only the applicable rules, but also the influence of nonlegal factors on client and adversary behavior. The authors have tried to make the problems as realistic as possible. Thus, characters in their problems have real-sounding names;<sup>68</sup> they have personalities (aggressive, sleazy, easy-going); they worry about legal expense; they are often—but not always—interested in the bottom line. Assignment 15, "The Prototypical Secured Transaction,"<sup>69</sup> illustrates both the realism of the problems and the interrelationship of law and business that is often their

---

61. See LoPucki, *supra* note 9, at 644-49 (discussing similar problems presented to students in another textbook of the Legal Realist genre: Warren & Westbrook's, *The Law of Debtors and Creditors*).

62. Cf. Rubin, *supra* note 7, at 118-19 (noting that, although the common law may disregard judicial enforcement costs, in economic analysis and decision-making, "all money counts equally").

63. LOPUCKI & WARREN, *supra* note 10, at 327.

64. *Id.* at 337.

65. As the authors state,

[A] lawyer who is uncertain as to the filing office in which a particular search or filing should be made can often solve the problem by searching or filing in more than one system. The possibility has led some observers to advocate filing "everywhere," but that word tends to be used by people other than those paying the bills.

*Id.* at 338.

66. For example, the authors develop a series of problems examining how a financier would deploy its inventory checkers to prevent debtor fraud. *Id.* at 314-16 (Problem Set 15). Those problems require one to take account of the physical layout of the debtor's premises and the physical limitations of inventory checkers.

67. Since the text and cases are largely expository, the teacher *must* spend most of the class time on the problems. It takes a while to get comfortable with classes that focus on multiple series of problems. There is need for review and warm-up at the outset of a class and for transition between problems, which can be met by cross-referencing and perspective discussion.

68. Conspicuously absent are the elusive "SP1" or "A" we so often find in other materials. Many of the names *are* recognizable as those of real people, but doing things they would be unlikely to do in real life. LOPUCKI & WARREN, *supra* note 10, at 540-41 (Problem 26.7).

69. *Id.* at 295-316.



focus.

This Assignment describes a floor-planning arrangement involving Bonnie Brezhnev, owner of Bonnie's Boat World. The text describes the process of Bonnie's application for an inventory loan, the approval process, and the closing.<sup>70</sup> Significantly, it also includes much of the legal documentation that would accompany the financing of a boat dealer's business.<sup>71</sup> Following the description of the transactions and the documentation, the authors begin with two problems involving the secured lender's process of "floor checking," that is, checking that the collateral for the loan continues to exist. One problem asks students to explain why the lender has adopted various floor-checking procedures;<sup>72</sup> another asks how the lender would have detected various kinds of borrower fraud.<sup>73</sup> These problems, of course, cannot be solved from the text of Article 9 or the other "legal" materials. To solve them, students must understand the underlying business transactions and the physical characteristics of the business.<sup>74</sup>

Ethics questions also enter these materials as they would a real secured lending law practice. They are not particularly complex and the authors have supplied some of the Model Rules of Professional Conduct to help in analyzing these kinds of problems.<sup>75</sup> The inclusion of such issues adds to the realism of the book, places ethics questions into the transactional context in which they arise, and, in the process, alerts students that professional responsibility concerns might surface outside the required ethics course. For those who maintain either that professional responsibility

---

70. *Id.* at 296-97.

71. Included are the "Agreement for Wholesale Financing," the financing statement, a description of the personal guarantee, and the Floorplan Agreement. *Id.* at 298-311. The Agreement for Wholesale Financing runs eight full pages. Commercial law materials do not normally require students to actually read full-blown, sophisticated commercial law contracts and solve problems with them.

72. *Id.* at 314 (Problem 15.1). They ask (with respect to a series of practices) "what sort of fraud or wrongdoing is the policy designed to prevent?" Examples include "If an item of inventory was sold, but the debtor has not yet remitted at the time of the floor check, the debtor cannot now "cure" by handing over the money." *Id.*

73. *Id.* at 315 (Problem 15.2). "Whenever Bonnie sells a boat, she offers to store it for the buyer. . . . If the buyer doesn't use the boat much, Bonnie does not report the sale to [the secured lender] . . . When the floor checkers come around, these boats are there for Bonnie to show them." *Id.*

74. Included in the assignment are the interrelated questions: What can the lender *possibly* do to ensure that the debtor does not cheat? and *what can be done cost effectively to ensure that the debtor doesn't cheat?* One, of course, needs to understand the first in order to offer the client plausible options with respect to the second.

75. LOPUCKI & WARREN, *supra* note 10, at 180-82 (Problem 8.4). A richer discussion can be had if students have with them a copy of the Model Rules of Professional Conduct. I required that they own a copy for the course.

should be taught using the “pervasive” method<sup>76</sup> or, simply, that we should teach more of it,<sup>77</sup> this is a very positive development. An example,<sup>78</sup> with some preliminary background, will be useful.

A secured party gets no priority *vis a vis* lien creditors until its security interest is “perfected.”<sup>79</sup> Perfection requires “attachment” of the security interest,<sup>80</sup> which in turn requires, among other things, that the debtor sign a security agreement containing a description of the collateral.<sup>81</sup> Thus, if the secured party forgot to get the debtor’s signature or left out the collateral description in the security agreement, it will have no security interest and no priority and will lose to a lien creditor or trustee in bankruptcy.<sup>82</sup> The problem arises, of course, when the borrower has filed for bankruptcy. The trustee asks the student-lawyer for the lender for a copy of the security agreement and the student-lawyer *then* discovers the blank space where the description of the collateral should have been. To recognize the ethics problem, students must understand that, under Article 9, the client loses to the trustee even if the client fills in the blank space now: Priority only dates from “attachment,” which would occur only on signing a *complete* security agreement.<sup>83</sup> Students must also be aware of the bankruptcy rule prohibiting any act to create or perfect a lien following the bankruptcy filing.<sup>84</sup> The ethical dilemma arises at two levels: 1) The lawyer messed up and has to decide how (if at all) to reveal that fact to the client, and 2) the client (or lawyer) has the power to secretly convert a currently unperfected security interest into an earlier perfected security interest and can probably get away with it despite the automatic stay<sup>85</sup> and the Rules of Professional Conduct.

What’s the lawyer to do now? Simply send the security agreement with the blank space to the Trustee? How much else can the lawyer do without

---

76. See, e.g., Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

77. See, e.g., Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945, 1951-52 (1993).

78. The example is drawn from LOPUCKI & WARREN, *supra* note 10, at 180 (Problem 8.4).

79. U.C.C. § 9-301(a)(b).

80. *Id.* § 9-203(1).

81. *Id.* § 9-203(1)(a).

82. *Id.* §§ 9-203(1), 9-301(a)(b).

83. *Id.* §§ 9-302, 9-203(1)(a), 9-301(1)(b).

One way out of the ethics problem to follow is to assert that § 9-203(1)(a) does not require that the description be present when the debtor signs—that what is really important is that the debtor sign something with the intent to convey a security interest. It is difficult to read the statute this loosely (“security agreement which contains”), but it does dodge the ethics issue quite nicely.

84. 11 U.S.C. § 362(a)(4) (1994).

85. *Id.*

running afoul of either the automatic stay or the Model Rules of Professional Conduct? Should she turn the decision over to the client? With what sort of discussion?<sup>86</sup> Could she give the client-lender "the lecture"<sup>87</sup> about U.C.C. and bankruptcy priorities? Can she counsel the client about the likelihood of being detected if the client were to fill in the blank? Can she advise the client to put a written description of the collateral into an envelope with the security agreement and send them to the trustee?<sup>88</sup> Stapled together?<sup>89</sup>

An added advantage the authors gain from the inclusion of professional responsibility issues within their materials is another set of standards from which to evaluate Article 9. A question they pose through the above problem<sup>90</sup> is whether the Article 9 rule that dates priority from "perfection" but leaves the evidence with the party asserting priority tempts lawyers (or their clients) with fraud, and whether it is a good rule if it does.

### III. ORGANIZATION

Two aspects of the book's organization are unconventional. First, the book is far more structured than other books in the field. Second, the substantive organization is very different from the mainstream.

The authors have organized the material into nine Chapters containing thirty-nine "Assignments" for the standard three hour course. Each Assignment is to occupy one class session. The *Teacher's Manual* suggests omissions for a two-hour course, and recommends a leisurely pace for the four-hour course.<sup>91</sup> This highly structured approach is novel. It facilitates teacher and student planning and allows the disciplined teacher to keep

---

86. The notes to this problem in the *Teacher's Manual* illustrate the guidance it provides throughout. The authors note that they:

ask the student on the spot to make the call to the client and explain what happened and what will happen now. We take the persona of the friendly (for the moment) client. This seems to be surprisingly hard to do. Students seem to balk over having to tell someone that they messed up. Sometimes we spend some time on that. In one class we had to call on four people to get anyone who would actually tell the client and explain the consequences. If this is hard in the classroom, what must it be like out there in the Real World?

TEACHER'S MANUAL, *supra* note 11, at 75.

87. ROBERT TRAVER, *ANATOMY OF A MURDER* 34-49 (1958).

88. TEACHER'S MANUAL, *supra* note 11, at 75. The same sort of problem returns later in the course. LOPUCKI & WARREN, *supra* note 10, at 571 (Problem 28.7).

89. TEACHER'S MANUAL, *supra* note 11, at 75.

90. *Id.* at 75-76.

91. *Id.* at 7-9.

pace by cutting material every day, if necessary.<sup>92</sup>

The assignments build on one another and later assignments refer to earlier ones. This relieves the individual instructor of some of the burdens of integrating the material, but it also limits the individual teacher's flexibility and creativity. The *Teacher's Manual* specifies assignments that the authors believe could be skipped, and the teacher's notes to individual assignments suggest individual problems that might be skipped without doing damage. Deviating from the recommendations could be risky during a first run through the materials. The integrated and cumulative nature of the book makes reorganization of the material quite burdensome.

This is important because the book's organization is also unconventional. Most secured transactions books approach the subject temporally and start near the beginning of the transaction with agreement between the debtor and creditor, proceed through perfection and priorities, and end with default.<sup>93</sup> LoPucki and Warren, perhaps taking a hint from Lon Fuller's then-unconventional notion that contracts must be approached through remedies,<sup>94</sup> begin their subject with remedies, first of ordinary creditors and then of secured creditors, both inside and outside bankruptcy.<sup>95</sup> Then they proceed with creating the security interest, including the limits imposed by state and bankruptcy law on the kinds of collateral that can be offered and the kinds of default terms that can be defined.<sup>96</sup> In about the middle of the book, they arrive at third party issues<sup>97</sup> such as perfection and proceed from there to conclude with priority issues<sup>98</sup> (including bankruptcy avoiding powers).

Teaching remedies first has several substantial benefits. First, understanding the lender's rights on default helps students to understand what a lender gets when it obtains a security interest.<sup>99</sup> By focusing on the collection rights of unsecured creditors, the relative value of the expanded remedies

---

92. This seemed a long book, at least the first time through. Even with a four-hour class and very bright, motivated students, it was impossible to cover the whole book and necessary to cut substantial material towards the end. A cut-a-little-daily approach might have been better, but I have not had good experience with such an approach in other classes.

93. Cf. BAIRD & JACKSON, *supra* note 16; SPEIDEL ET AL., *supra* note 16.

94. See LON L. FULLER, BASIC CONTRACT LAW: A SELECTION OF JUDICIAL DECISIONS AND READINGS SUPPLEMENTED BY COMMENTS PREPARED BY THE EDITOR (1946). Fuller's casebook was the first widely-used contracts casebook to begin with remedies.

95. LOPUCKI & WARREN, *supra* note 10, at 3-159 (Assignments 1-7).

96. *Id.* at 161-294 (Assignments 8-14).

97. *Id.* at 319-526 (Assignments 16-25).

98. *Id.* at 527-791 (Assignments 26-39).

99. See TEACHER'S MANUAL, *supra* note 11, at 2.

available to secured creditors becomes clear to the student. This much is within the "remedies-first" tradition begun by Fuller. But there is an additional, subtler benefit the authors realize by beginning with creditor remedies. Through it, they develop the crucial distinction between the secured transaction and its look-alikes<sup>100</sup> and include problems that begin sensitizing students to priority issues that are central to secured lending. When one finally arrives at priority issues toward the end of the course, one finds that the students have an excellent, nearly intuitive base of learning on which to build.<sup>101</sup>

There are, of course, disadvantages to the authors' organization as well. Many teachers regard the questions of priority as the centerpiece of secured credit. Other books place priority near the center of the course, and it is probably pedagogically sound to study it at a time when students are comfortable with the subject matter but not worn out and reviewing for exams. LoPucki and Warren begin priority towards the end of the course.<sup>102</sup> Admittedly, students bring maximum sophistication to the materials at this point and have the advantage of familiarity with the basic rules. However, their placement near the end requires discipline in the instructor's pace to avoid sending students home with an incomplete course. It also requires substantial amounts of student energy at a time that they may be least able to deliver it. As suggested earlier, an individual teacher's reorganization of the material to put priorities earlier would be a risky solution.

#### IV. SHIFTING THE EMPHASIS FROM LITIGATION TO PLANNING

Business lawyers do transactional work, and transactional work is fundamentally different from litigation.<sup>103</sup> But with the dominant case-

---

100. See *supra* notes 45-47 and accompanying text.

101. As should be clear from their empiricist orientation, LoPucki and Warren are not persuaded by the "ostensible ownership" theory of secured credit. See Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887 (1994); but cf. BAIRD & JACKSON, *supra* note 15, at 1-81, 101-03 (relying on ostensible ownership as basis of secured credit). If one jettisons the protection of third parties as a reason to distinguish secured transactions from their look-alikes, one is left with a more basic reason: protecting the person who carries the risks of ownership of the collateral during the lending relationship. In this area of law, the question plays out in the context of whether a court will require foreclosure proceedings in order for the creditor to get the collateral. At a very basic level, then, remedies is an excellent vehicle for beginning instruction on the crucial distinction between a secured transaction and other commercial arrangements.

102. Priorities (including the trustee's strong-arm power and power to avoid preferences) formally begin in Assignment 26. LOPUCKI & WARREN, *supra* note 10, at 527. The book has 791 pages of text.

103. Apart from its forward-looking nature and greater need to cope with an uncertain future, transactional work often involves collaboration with a contracting partner to create new value; litigation

book method of law school instruction comes an emphasis in the materials on appellate cases and, ultimately, on litigation.<sup>104</sup> This is unrealistic in nearly any law school course. In business law courses, where the law most often will be used for planning, a litigation orientation seems particularly out of place. Law schools are just beginning to explore ways of putting students into a transactional orientation through new forms of skills training and of teaching.<sup>105</sup> But because a lawyer's approach to transactional work is so fundamentally different from her approach to litigation, one need not engage in costly transactional skills training to reorient students from thinking like a litigator to thinking like a business lawyer. LoPucki and Warren's book opens the possibility of offering students a largely transactional orientation even in the large-class law school format. This will inevitably improve students' preparation for actual business law practice.

It is the nature of their problems which opens a transactional approach to the traditional, large classroom. The bulk of the problems are set at the time of the transaction rather than at the time of default or litigation. They are often open-ended rather than closed. Instead of providing all the facts for a student to work with, the problems often are designed with unknown, uncertain, or simply missing facts. They sometimes include information about the other side's or the client's personality that might be relevant in deciding how to approach the problem. The legal costs for the client in obtaining an otherwise optimal result and the compliance costs for the client in minimizing risks are often central to the problems. The authors' approach to their problems was first developed through Warren's collaboration with Jay Westbrook in their bankruptcy casebook,<sup>106</sup> and that approach is extended and further refined here.

The relatively open-ended problems require students to use their imagination and common sense in ways that may be alien to their law

---

is most often a zero-sum game with the winner taking all.

104. The teacher, of course, does not have to pursue a litigation approach, even with the most traditional casebook. Yet the typical classroom hypothetical simply adjusts a case's facts and calls for a student response to the question of how a court would rule on the new set of *fixed* facts. This is the grist of the litigator. If one begins with a case and asks "how the client should change its lending practices to accommodate this judicial ruling," one can refocus the analysis toward planning. There are surely far more "change-the-facts" hypotheticals than the other kind, even in business law courses. The LoPucki and Warren materials will help the teacher develop the teaching skills needed to bring a broader range of transactional questions into the classroom and enrich the teaching of other business courses as well.

105. In October 1994, the Association of American Law Schools held a 2½ day conference on teaching transactions. It was a first.

106. See LOPUCKI, *supra* note 9, at 643, 644-49.

school experience; students require time to learn how to weave legal and nonlegal factors into options for the client. But the problems train them to ask relevant questions, even if they are not (strictly speaking) legal. In developing a foolproof method for a client to perfect its security interests, the potential competency of the client's work force is relevant to the system one ultimately adopts. If filing a lawsuit will jeopardize business relationships with non-defendants, that nonlegal fact is certainly relevant in a client's decision whether to sue.<sup>107</sup> But a business lawyer's deep understanding that legal and nonlegal factors are interrelated is not intuitive. Traditional, litigation-oriented law school instruction does little to teach this connection and might well suggest that such integration need not occur at all.

These problems not only show students that legal and nonlegal factors interact in most transactional work, but begin training them to do the integration. They get used to the uncertainty of the future and learn how to assist clients with decisions, not give them answers.

Open-ended problems require more of teachers than do closed-fact problems that have only one or two answers. The instructor must be prepared to react to a broad range of plausible answers supplied by students, and this can be daunting. But the authors have sensed that and provided a 290-page *Teacher's Manual* to help the teacher prepare. The authors tell us what they were trying to accomplish with each problem and nearly always give an exhaustive discussion of the range of responses to expect. Nonetheless, one should expect a little less teacher "control" over the discussion that inevitably comes with open-ended questions. This could be unsettling (but healthy) for a teacher who is inexperienced in the subject matter.

#### V. LOPUCKI, WARREN, AND THE "THEORY—PRACTICE DICHOTOMY"

It should be evident from the discussion that LoPucki and Warren's book should also be seen as one of the first to so explicitly marry theory and practice in one set of materials that orients the student to thinking like a transactional lawyer. This, once again, mirrors empiricist scholarship.

The scholarly work of the empiricists has shown quite convincingly that what people do in practice ought to matter when formulating legal

---

107. Cf. Weintraub, *supra* note 11, at 20 & n.60, (noting the unlikelihood of litigation arising between parties engaged in relational contracting as opposed to discrete contracting).

policy—that there is no true dichotomy between the two in the law.<sup>108</sup> If damages for breach of a contract do not, in fact, “deter” breaches, we have to reconsider the views that are predicated on the proposition that they do.<sup>109</sup> More to the point, if the Article 9 filing system does not, in fact, allow unsecured creditors to limit their risks, a theory that justifies secured credit on that basis becomes questionable.<sup>110</sup>

LoPucki and Warren’s book demonstrates how naturally the empiricist scholar can deliver to students practice-centered, “real” exercises that prepare them more directly for what they will encounter in their transactional practices. This is because, like the empiricist, the business law practitioner is concerned about the law as it actually operates in the real world—on a mix of incomplete current facts and future uncertainty. The materials are certainly ample to expose students to the basics—reading commercial statutes, understanding the functions secured credit rules are thought to serve, and using that analysis to urge one interpretation over another. Beyond these basics, students also come away from the materials understanding the strategic uses clients will find for the law,<sup>111</sup> how the client’s business interests interact with legal choices, and the limits imperfect information imposes on giving good legal advice. A deep understanding of these dynamics of the transactional practice most often comes only *after* law school, and this has no doubt fanned the theory-practice debate.

LoPucki and Warren’s book has the potential to alter the way we perceive and use the large law school classroom. Long the haven of the traditional casebook, the Socratic method, and the theoretician, the large classroom setting has been neglected by those seeking to better prepare students for their lives as law practitioners. Yet once one understands that practitioners—particularly those engaged in transactional work—*think* about client legal problems more curiously, comprehensively, and inclusively than students are trained to, one begins to see that the empiricist orientation offers great potential for modeling actual practitioners’ approaches to legal

---

108. One could urge that there is a definitional dichotomy—that theoreticians form hypotheses and empiricists test them. This occurs in the hard sciences, but in social sciences the testing of hypothesis and theory is far less prevalent, and in law, it is virtually non-existent. In my view, an empiricist-based explanation, e.g., “what the judge has for breakfast” has equal claim to “theory” status as does an explanation complete with graphs and equations.

109. Cf. Woodward, *supra* note 32.

110. Cf. LoPucki, *supra* note 101.

111. Problems that raise bidding strategies at foreclosure sales are examples. See LOPUCKI & WARREN, *supra* note 10, at 87-89 (Problem Set 4).



problems, even in the large classroom. We may not often be able to teach students the skills of negotiating, counseling, or rainmaking in the large classroom, but we can do a much better job teaching them what real business lawyers do, how they approach problems, and how they think. The stature of the authors, their hefty, superb *Teacher's Manual*, and the book's compelling style will bring the book into many classrooms where it will do its work teaching students to approach problems not like theoreticians, but like practicing lawyers or empiricist scholars. Business law practice may eventually be the better for it.